

TABLE OF CONTENTS

<u>Table of Authorities</u>	3
<u>Argument</u>	4
POINT 1: THE PUBLIC SERVICE COMMISSION ERRED IN APPROVING THE 2007-2008 ACTUAL COST ADJUSTMENT RATES FOR ATMOS ENERGY CORPORATION, BECAUSE THE ORDER IS UNLAWFUL AND UNREASONABLE AND SUBJECT TO REVIEW UNDER SECTION 386.510 RSMO, IN THAT THE ORDER VIOLATES 4 CSR 240-40.016 AND IS NOT BASED UPON COMPETENT AND SUBSTANTIAL EVIDENCE	4
I. Response to Fair Market Price Arguments	4
II. Response to Fully Distributed Cost Arguments	12
III. Response to Court Cases Cited by the Respondents	17
IV. Response to Respondents’ Procedural Claims	20
<u>Conclusion</u>	20
<u>Certificate of Compliance with Supreme Court Rule 84.06(c)</u>	22

TABLE OF AUTHORITIES

Cases

<i>Associated Natural Gas Co. v. P.S.C.</i> , 954 S.W.2d 520 (Mo. App. W.D. 1997)	8, 19
<i>Atmos Energy Corp. v. P.S.C.</i> , 103 S.W.3d 753, 763 (Mo. 2003)	5
<i>Chicago, Rock Isl. and Pacific RR Co., v. P.S.C.</i> , 441 S.W.2d 742 (Mo. App. 1979) ...	17
<i>Public Counsel v. P.S.C.</i> , 274 S.W.3d 569 (Mo. App. W.D. 2009)	19, 20

Statutes:

§ 386.500(2) RSMo	17
§ 386.510 RSMo	4
§ 393.130 RSMo	6, 19

Other Authorities:

4 CSR 240-40.015	16
4 CSR 240-40.016	4, 5, 16
Appellate Rule 84.04(c)	20

ARGUMENT

POINT 1

THE PUBLIC SERVICE COMMISSION ERRED IN APPROVING THE 2007-2008 ACTUAL COST ADJUSTMENT RATES FOR ATMOS ENERGY CORPORATION, BECAUSE THE ORDER IS UNLAWFUL AND UNREASONABLE AND SUBJECT TO REVIEW UNDER SECTION 386.510 RSMO, IN THAT THE ORDER VIOLATES 4 CSR 240-40.016 AND IS NOT BASED UPON COMPETENT AND SUBSTANTIAL EVIDENCE.

I. Response to Fair Market Price Arguments

A. Response to Respondents' Claim That an Affiliate Transaction Can Set the Fair Market Price

The Office of the Public Counsel's ("OPC" or "Public Counsel") Substitute Initial Brief argued that the Public Service Commission's ("PSC" or "Commission") Report and Order on appeal misinterpreted the PSC's Affiliate Transaction Rules (Rules) when the PSC concluded that the price paid by Atmos Energy Corporation ("Atmos", "AEC" or "Company") to its affiliate Atmos Energy Marketing (AEM) for gas supply could be used to establish the fair market price for purposes of applying the asymmetrical pricing standard of 4 CSR 240-40.016(3)(A). The Respondents argue in reply that the PSC only needed to conclude that Atmos used an open bid process, and that the fair market price was established by the affiliate's low bid. The Respondents cite to 4 CSR 240-40.016(4) as the legal basis for their conclusion that the fair market price of an affiliate transaction

is the same as the affiliate's bid in a bid process where the affiliate's bid is the lowest. OPC agrees that under 4 CSR 240-40.016(4), the gas company must obtain competitive bids or demonstrate why such bids are neither necessary nor appropriate. 4 CSR 240-40.016(4)(A). However, separate and distinct from that requirement is the requirement that the gas company shall document both the fair market price of the gas and the fully distributed cost to the regulated corporation to acquire the gas for itself. 4 CSR 240-40.016(4)(B). Nowhere do the rules state or suggest that the fair market price can be set based upon an affiliate transaction so long as the gas company obtains competitive bids under 4 CSR 240-40.016(4)(A). The Affiliate Transaction Rules (Rules) are meant to ensure that the gas company documents its practices in a manner that allows the OPC, Staff and the PSC to have the information necessary to ensure compliance with the asymmetrical pricing standard. 4 CSR 240-40.016(4)(B) and 4 CSR 240-40.016(5)(C).

The intention of the Rules is to establish a well-documented process that preserves cost data and documents to allow the PSC to determine whether the gas company paid its affiliate the lesser of the fair market price or the fully distributed cost for every affiliate transaction. When Atmos and other LDC's initially challenged the Affiliate Transaction Rule's Order of Rulemaking, the gas companies argued "that the PSC acted outside of its authority because the rules impose record keeping requirements on both the utilities and their affiliates." *State ex rel. Atmos Energy Corporation, et al. v. Public Service Commission*, 103 S.W.3d 753, 763 (Mo. 2003) ("Atmos"). The Missouri Supreme Court rejected Atmos's argument, and held that "the PSC has the authority to extend the reach of the rules to a utility's affiliates." *Atmos*, 103 S.W.3d at 764. The Court stated that "the

rules require utilities to ensure that they and their affiliates maintain records of certain transactions” to allow the PSC “to police compliance” with the rules. *Id.* The Court recognized that the Rules required “utilities to maintain records so that it may determine whether utilities are following their obligations” under the Affiliate Transaction Rules, which are an extension of the requirements of Section 393.130.2 RSMo. *Id.*

Atmos’s brief attempts to support the PSC’s decision regarding Atmos’s fair market price determination under the Affiliate Transaction Rule by quoting from the PSC’s Order, where the PSC states:

Fair market price is set by the market, not by the Staff’s review of documents.

Even if Atmos and AEM gave Staff every document they could ever hope to examine they could still never determine a “real fair market price” unless they were able to undertake a full rate case to establish among other things an allowed rate of return for the unregulated gas marketing company.¹

These two sentences provide a sample of the PSC’s failure to properly determine a lawful fair market price. Although the PSC is correct in that the market is what sets a fair market price, the PSC fails to recognize that the Staff’s review of Atmos’s documents is necessary to allow the Staff and the PSC to determine what a fair market price should be, as intended by the Affiliate Transaction Rules. If such prices are not contained within documents kept by the Company, the PSC will be unable to determine the fair market price. The second sentence of the above quote essentially concludes that the PSC does

¹ Atmos Brief, p. 18, *citing* Legal File (L.F.) 1365.

not need to follow the asymmetrical pricing standard of the Rule because it is impossible to determine the fair market value. This conclusion is contrary to the Rule because it essentially states that document retention by the Company and review of those documents by the Staff serves no purpose.

The PSC argues that unless there is evidence of collusion, there is no reason to look beyond the bidding process to establish the fair market value. But the PSC must look beyond the bidding process when an affiliate is the winning bidder because by definition the fair market price cannot be established by a price resulting from an affiliate transaction. (L.F. 1348). OPC argued in its Initial Brief that the fair market price cannot be established by affiliate transactions because by definition, a fair market price can only be established by unaffiliated companies. The Respondents did not offer a response to this argument except to wrongly claim that it was OPC's position that the fair market price definition should *not* have been used. OPC's true position is that the definition of fair market price was not followed, that it *should* have been followed, and that the PSC's reliance upon an affiliate transaction to set the fair market price is unlawful because it is contrary to the definition of fair market value.

B. Response to Claim that the RFP Process was Competitive

Respondents argue that Atmos's bid solicitation for gas supply was "robust," "competitive", and "allowed the opportunity for the Company to obtain numerous proposals from a variety of gas marketers." Atmos's RFP process can hardly be considered "robust", or even "competitive." The PSC's argument references Atmos's first Request for Proposal (RFP) and states that Atmos solicited six bidders, but the PSC

does not disclose that only four of those non-affiliate bids were “conforming bids” that conformed to the requirements of the RFP.² The PSC also chose not to mention the second RFP where only *two* non-affiliate bids conformed to the requirements of the RFP.³ The Court of Appeals addressed a similar issue involving an ACA review in *State ex rel. Associated Natural Gas Co. v. P.S.C.*, 954 S.W.2d 520, 524 (Mo. App. W.D. 1997) and found that the RFP process was not thorough, citing to the fact that “proposals were received from a total of three other potential suppliers” in addition to the affiliate’s bid. Likewise, Atmos’s bid process in Hannibal can hardly be called competitive when AEM competes with only two to four other suppliers.

The PSC argues that there was no evidence that the bidding process “was adequate when Atmos contracted with unaffiliated companies but inadequate when it contracted with an affiliate.” Unlike non-affiliates, the price paid to an affiliate has limitations that were put in place to prevent increased rates caused by collusion among related companies. The same concern does not exist for non-affiliates under the PSC’s Rules.

C. Response to the Claim that the Staff Proposed a Disallowance

Because AEM Did Not Provide Records

The PSC argues that its Staff recommended disallowing all AEM profits because AEM did not produce the records Staff requested showing AEM’s gas costs. This argument wrongly suggests that the reason for the Staff’s proposed disallowance was

² Tr. 360, Ex. 1, Buchanan Direct Testimony, Attachment 2, p. 2.

³ Tr. 726-727, Ex. 1, Buchanan Direct Testimony, Attachment 2, p. 2.

because Atmos did not produce affiliate records, or because the affiliate profited from the gas sale. These claims are simply not true. In the PSC Staff's recommendation to the PSC, the Staff explained its efforts to determine the fair market value of the gas Atmos acquired from AEM:

One way of assessing the fair market value of these agreements is to look at the elements of the underlying supply that was used to fulfill AEM's obligation to provide firm service. Staff could not determine, from the information provided, if the underlying gas packages bought by AEM were firm or interruptible packages of gas. By definition, the transactions between AEC and AEM are not arms-length. A dollar of profit for AEM impacts AEC's earnings. The same cannot be said for unaffiliated transactions. AEM and AEC share limited resources regarding access to liquidity and counterparty credit exposures. The same cannot be said for unaffiliated transactions. At some point in AEC's organizational structure, there is common oversight of both AEC and AEM. The same cannot be said of unaffiliated transactions. The nature and design of compensation and bonuses can have a bearing on AEM and AEC's common transactions. The same cannot be said of unaffiliated transactions. The time and quantity of day to day nominations can impact the profitability of affiliated AEM and AEC transactions. That is not the case with unaffiliated transactions. Thus, the documentation supporting affiliated transactions need to be clearly identified

and provided to Staff to determine the true market value for those transactions.⁴

The reason the Staff proposed a disallowance equal to AEM's profits is because Atmos did not provide sufficient records to support gas costs that follows the definition of fair market price. The Staff requested the profit data because it appears to be the only records retained by the Company that would allow the Staff to determine what two unaffiliated companies would agree to in an arm's length transaction for gas sold at a contemporaneous time and place. Although the PSC states that AEM could not produce the requested records, OPC is not aware of any AEM response on the record stating that it did not have the requested records.

**D. Response to the Claim that the Staff and OPC Did Not Raise
Serious Doubt Regarding the Prudence of Atmos's Gas Costs**

The PSC's Staff and OPC, through prefiled testimony, live testimony, and Company documents, raised "serious doubt" about whether Atmos's 2007-2008 gas purchases from AEM complied with the asymmetrical pricing standard. The first serious doubt in this case was raised by Atmos, without help from Staff or OPC, when Atmos failed to show that it documented either the fair market price or the fully distributed cost. This lack of clarity and lack of recordkeeping alone should raise serious doubt about the lawfulness and reasonableness of the PGA rates that Atmos charged its customers. Serious doubt is also raised by the fact that what Atmos determined to be the fair market

⁴ L.F. 177.

price is based upon an affiliate transaction that by definition is not an arm's length transaction and cannot be the basis for a fair market price.

Regarding the RFP that brought gas to Hannibal, the PSC states that the RFP requested "firm and warranted" service, but also allowed bidders to use either a primary receipt point ("primary firm delivery") or a secondary receipt point ("just below primary firm delivery"). (PSC Brief, p.6). This creates a conflict between the RFP requirement for firm delivery, and the allowance for a secondary receipt point that is "just below primary firm delivery." This ambiguity creates an opportunity for an anti-competitive bidding process that puts the affiliate at a great advantage if the affiliate has a better understanding of what its parent company will accept. This opportunity is magnified in this case because no other bidders bid the secondary receipt point except AEM. (Tr. 452). This opportunity is further magnified because a transaction confirmation document that normally specified the delivery of "firm" gas was inexplicably left blank when the same document was between Atmos and AEM, which seemingly allowed for the delivery of less than firm gas from its affiliate. (Tr. 390-392). The Staff requested AEM records that would prove whether the gas it supplied was firm or less than firm, but Atmos failed to produce those records. (L.F. 177). When considered individually, or all together, the above items sufficiently raise a serious doubt about Atmos's PGA rates.

The Respondents claim ratepayers benefited from the affiliate transaction because they would have had to pay higher costs if Atmos had accepted the gas supply bid of a non-affiliate. But it is impossible to know whether those bids would have been lower had

all suppliers bid the secondary receipt point. The PSC simply does not know what the non-affiliate would have bid on a level playing field.

II. Response to Fully Distributed Cost Arguments

OPC's Initial Brief argued that the Report and Order unlawfully concluded that Atmos did not need to calculate the fully distributed cost to acquire the 2007-2008 gas supply. In response, the Respondents argue that OPC and the Staff did not present any argument to suggest that Atmos could provide gas marketing services for itself cheaper. The PSC fails to recognize OPC's position, where OPC argued the following:

The evidence before the Commission demonstrates that Atmos, the largest LDC in the United States, is certainly capable of making natural gas purchases and that Atmos could have acquired the gas supply for itself rather than through AEM.⁵ AEM acquired the gas through an arms-length transaction in a competitive market that is also available to Atmos. Atmos' decision to purchase gas through its marketing affiliate AEM, rather than by making the gas purchases itself (and avoiding the AEM profit mark-up) is reason alone to render Atmos' purchasing decisions imprudent. Had Atmos purchased the gas itself, Atmos' customers would not have paid the AEM profits that ultimately benefited Atmos' shareholders. Atmos has not provided a sufficient

⁵ Ex. 28, Sommerer Surrebuttal, pp. 4-5.

explanation to overcome the Staff's evidence indicating that Atmos could have acquired the gas supply on its own at similar cost as AEM.⁶

OPC also argued in its reply brief before the PSC that, "OPC specifically challenges the prudence of purchasing gas at a marked up price from an affiliate gas marketer rather than by acquiring the gas resources for itself without such a mark-up, something Atmos is fully capable of doing."⁷ This argument addresses Atmos's fully distributed cost of providing its own gas marketing services.

OPC was not alone in its argument – the PSC Staff witness Mr. David Sommerer testified in response to the claim by Atmos's witness, Ms. Rebecca Buchanan, that Atmos does not possess the skills and experience to make their own gas purchases:

Ms. Buchanan asserts in her discussion that AEM brings to bear some special skills, access to gas markets, and a unique scope of operation not found in Atmos' gas supply department. When viewed in the context of the services AEM actually did perform for its LDC affiliate, Ms. Buchanan's conclusion that the LDC by itself doesn't possess sufficient skills and experience to access the gas markets and to buy gas for its captive ratepayers is not believable. ... The LDC knows the amount of its monthly requirements from the reviews it conducts of its supply requirements. The LDC has the expertise to reasonably estimate baseload supply needs for each month and to estimate

⁶ L.F. 1267, Initial Brief of the Office of the Public Counsel, p. 9.

⁷ L.F. 1332, Reply Brief of the Office of the Public Counsel, p. 3.

the contractual volumes and flexibility it requires from storage injections and withdrawals and swing and daily flowing supply for various months and weather conditions. Thus, the LDC could reasonably acquire the baseload volumes and swing volumes through direct contact with potential bidders or through a more formal RFP process similar to that used to award its requirements to AEM. Indeed, AEM's knowledge of Atmos' requirements can be no greater than Atmos' own knowledge of its requirements. Smaller LDCs in Missouri order their own gas.⁸

The PSC should have been well aware of OPC's challenge to Atmos's claim that its fully distributed cost exceeded the fair market value of the gas acquired for the Hannibal area.

Atmos argues in its brief that the PSC Staff's proposed disallowance did not take into account that AEM has administrative overheads. This argument is misleading because the PSC's Staff would have offset its disallowance by the overhead amount if that information had been provided to the Staff by Atmos.⁹ Atmos had the burden of providing that data to prove that a deduction of the fair market price was appropriate. Atmos failed to meet that burden. In its initial brief to the PSC, OPC stated:

The fair market price of the gas purchased by AEM would not include AEM's overhead costs, and therefore, if overhead costs are included in the \$308,733 figure, those overhead costs should be subtracted out to reach the proper fair

⁸ Ex. 28, Sommerer Surrebuttal, pp. 4-5.

⁹ Tr. 638.

market price of the gas. Unfortunately Atmos did not provide any evidence as to AEM's overhead costs, which Atmos very well could have provided during the evidentiary hearing, but which Atmos chose not to provide. If the Commission concludes that a disallowance is warranted but that overhead costs should be subtracted from the \$308,733 figure, the Commission may direct Atmos to provide a late filed exhibit identifying those overhead costs.¹⁰

Atmos and AEM are responsible for providing overhead costs as an offset, and to argue that the PSC's Staff failed to deduct overhead costs is misleading. Only Atmos and AEM have the data showing those overhead costs.

Atmos's brief walks through the PSC's rationale for finding that Atmos's fully distributed cost to provide gas marketing services would exceed the fair market price. The first reason the PSC found was that Atmos "does not have the in-house expertise." Whether Atmos has the expertise is not the question – the question is how much it would *cost* to gain that expertise if in-fact Atmos lacks expertise in gas purchasing. The PSC next stated that "Atmos would need to hire or train additional personnel....and develop processes." Again, the PSC fails to determine what it would cost to hire or train additional personnel and develop processes. Next, the PSC states that the price and cost of gas "would still be determined by market forces." This is irrelevant to the question of what it would have cost Atmos to purchase its own gas rather than use its affiliate. Lastly, the PSC states that Atmos's "core competency" is distributing gas, and it would

¹⁰ L.F. 1276.

“most efficiently provide services to its customers by focusing on that core competency.” Once again, the PSC’s rationale strays from the real issue, which is determining the cost to acquire the gas. Whether or not it makes sense for Atmos to provide this service in-house is not the question – the asymmetrical pricing standard does not apply only to companies where providing the service in-house would make sense. The question is a simple one of cost determination, based on a reliable *study* of what it would cost Atmos to provide the services that its own Affiliate appears to provide profitably and without difficulty.

The PSC says the Report and Order “does not show that Public Counsel presented independent evidence on this [fully distributed cost] issue, only that Public Counsel supported Staff’s position.” Contrary to the PSC’s assertion, OPC is not limited to relying only upon evidence it submitted to support its positions.

The PSC also argues that OPC did not specifically raise the fully distributed cost issue in its Application for Rehearing. OPC raised the issue on the first page of its Application for Rehearing, where OPC stated, “The Order unlawfully misapplies the Commission’s Affiliate Transaction Rules, 4 CSR 240-40.015 and 4 CSR 240-40.016, including the requirement that Atmos Energy Corporation follow the asymmetrical pricing standards and the recordkeeping requirements of the Rules.”¹¹ The asymmetrical pricing standard requires a fully distributed cost determination and a fair market value determination, and therefore the fully distributed cost issue was specifically raised by claiming that the Report and Order did not follow the standard. 4 CSR 240-40.016(3)(A).

¹¹ Tr. 1372.

This issue cannot be separated from the fair market value determination because the asymmetrical pricing standard necessarily requires evidence of both fair market value and fully distributed cost to properly determine which of the two would be least costly. *Id.* Furthermore, even language that is “extremely general and imprecise...is sufficient” to be “preserved” for consideration under Section 386.500(2) RSMo. *State ex rel. Chicago, Rock Island and Pacific Railroad Co., v. P.S.C.*, 441 S.W.2d 742 (Mo.App. 1979).

OPC raised serious doubt about Atmos’s fully distributed cost determination by showing that Atmos performed no calculation in determining whether its fully distributed cost is more or less than the fair market price. The Staff also presented evidence showing: (1) that Atmos has the experience to acquire its own gas;¹² (2) that Atmos is the largest LDC-only gas company in the United States;¹³ (3) that smaller LDCs make their own gas purchases without using a gas marketer;¹⁴ (4) that Atmos knows the amount of its monthly requirements;¹⁵ and (5) that Atmos could hire or train gas purchasers to make gas purchases in-house. Serious doubt has been raised over whether Atmos properly calculated its fully distributed cost, and the burden of proof should have shifted to Atmos.

If the PSC does not ensure compliance with the Affiliate Transaction Rule, especially in cases where the public utility refuses to release requested documents, the

¹² Ex. 28, Sommerer Surrebuttal Testimony, p. 5.

¹³ Ex. 27, Sommerer Rebuttal Testimony, p. 2.

¹⁴ Ex. 28, Sommerer Surrebuttal Testimony, p. 5.

¹⁵ *Id.*

public has no assurance that their rates are not subsidizing the utility's unregulated affiliate. If the PSC does not properly determine the lesser of the fair market price of the gas or the cost to acquire the gas itself, the PSC will never have the evidence it needs to determine which avenue of acquiring gas is less costly.

III. Response to Court Cases Cited by the Respondents

The Respondents cite to several Missouri cases that they claim offer support for the PSC's legal conclusions in its Report and Order. The first case is *State ex rel. Associated Natural Gas Company v. Public Service Commission*, 954 S.W.2d 520 (Mo. App. W.D. 1997)(“ANG”). This case also originated with the PSC as an ACA review and involved a regulated utility buying gas from an unregulated affiliate. The Court of Appeals reversed a PSC disallowance for two reasons: (1) the PSC order was unlawful for disallowing costs in a prudence analysis without finding a detriment to the customer; and, (2) the PSC order was unlawful for disallowing costs that, during the 1988-1992 period, were Federal Energy Regulatory Commission (FERC) authorized and under the *filed rate doctrine* were required to be given binding effect by state utility commissions in determining intrastate rates. *ANG* 954 S.W.2d at 532.

The *ANG* decision, which occurred before the PSC adopted its Affiliate Transaction Rules, is helpful to the analysis in the present case for several reasons. First, the Court of Appeals makes a distinction between two purposes of the ACA by stating that the ACA settles up the difference between the LDC's estimated costs charged through the PGA and the actual costs that the LDC incurred, and “also provides the PSC with an opportunity to review the reasonableness of the LDC's costs by evaluating its gas

acquisition practices.” *Id.* at 523 [emphasis added]. On this second purpose, the Court of Appeals explains the scope of a prudence review, which is for the purpose of determining whether the rates charged were “just and reasonable.” *Id.* By limiting the prudence review to determining whether the rates charged were just and reasonable, the Court distinguishes that determination from determining whether the LDC’s actions were lawful, since Missouri law requires that all rates charged by an LDC “shall be just and reasonable *and* not more than allowed by law or by order or decision of the commission.” § 393.130.1 RSMo [emphasis added]. The question of the lawfulness of the PGA rate, therefore, must occur when comparing the estimated PGA costs to the actual costs, since all actual costs must have been incurred lawfully. Accordingly, on questions of lawfulness, the burden of proof is upon the LDC to prove that its costs were incurred lawfully. Applying this understanding of a prudence review to the present case, the burden of proof should have been upon Atmos to prove that it paid its affiliate no more than the lawful rate under the Affiliate Transaction Rule.

Atmos argues that pursuant to the decision in *ANG*, there is no basis for disallowing costs because OPC has not established that the imprudence caused actual harm to the ratepayers. However, the amount that the Staff proposed to be disallowed *is* the harm experienced by ratepayers because it represents the difference between what customers actually paid, and what they *should have* paid if Atmos had paid its affiliate no more than the fair market price of the gas supply. (L.F. 177).

The Respondents also cite to *State ex rel. Public Counsel v. Public Service Commission*, 274 S.W.3d 569 (Mo. App. W.D. 2009)(“*UE*”) to support their argument

that the Staff and OPC had the burden of proving that Atmos unlawfully compensated its affiliate for gas supply. In *UE*, the Court of Appeals considered amounts that Union Electric (UE) paid an affiliate for the purchase of combustion turbine generators (CTGs). *UE*, 274 S.W.3d at 577. OPC and the State argued that the PSC wrongly put the burden of proof on OPC and the State to prove that UE overpaid for the CTGs because the Affiliate Transaction Rule required UE to “demonstrate” that it properly priced its transaction with its affiliate. *Id.* OPC and the State claimed that the Affiliate Transaction Rules superseded any prior practice of placing the burden upon OPC or another challenger to a utility’s affiliate transaction costs. *Id.* The Court of Appeals rejected this argument and concluded that the rule specifically states that it “does not modify existing legal standards regarding which party has the burden of proof in the commission proceeding.” *Id.* This case can be distinguished from the present case because the Court of Appeals in *UE* did not address a challenge as to whether a presumption of prudence should apply to transactions with an affiliate due to the incentive and ability that a public utility has to shift costs of its unregulated affiliate into the rates of its regulated company. Those issues are being raised here for the first time.

IV. Response to Respondents’ Procedural Claims

Atmos claims that OPC’s Substitute Initial Brief “violates Appellate Rule 84.04(c) calling for a statement of facts “without argument.” However, Atmos does not explain where OPC included argument in its Statement of Facts, and for this reason, OPC is not able to respond to this claim.

Conclusion

The court should reverse the Commission's order because it is unlawful, unreasonable, arbitrary and capricious and an abuse of discretion.

Respectfully submitted,

OFFICE OF THE PUBLIC COUNSEL

/s/ Marc D. Poston

Marc Poston (# 45722)
Deputy Public Counsel
Missouri Office of the Public Counsel
P. O. Box 2230
Jefferson City, MO 65102
(573) 751-5558 (Telephone)
(573) 751-5562 (Fax)
e-mail: marc.poston@ded.mo.gov

Certificate of Service

I hereby certify that this brief was filed through the Court's electronic filing system and through that system served upon the following.

Jennifer L. Heintz
P.O. Box 360
Jefferson City, MO 65102
Fax: (573) 522-4016
Attorney for the Missouri Public Service
Commission

Larry W. Dority
101 Madison St.
Suite 400
Jefferson City, MO 65102
Fax: (573) 636-0383
Attorney for Atmos Energy Corporation

/s/ Marc D. Poston

Marc D. Poston

CERTIFICATE PURSUANT TO RULE 84.06(c) AND 84.06(g)

I hereby certify that the foregoing Brief of Appellant Office of the Public Counsel of Missouri complies with the limitations contained in Rule 84.06(b) and, according to the word count of the word-processing system used to prepare the Brief (excepting there from the cover, certificate of service, this certificate, and the signature block and the appendix), contains 4,639 words.

/s/ **Marc D. Poston**

Marc Poston (# 45722)
 Deputy Public Counsel
 Missouri Office of the Public Counsel
 P. O. Box 2230
 Jefferson City, MO 65102
 (573) 751-5558 (Telephone)
 (573) 751-5562 (Fax)
 e-mail: marc.poston@ded.mo.gov
 Attorney for Appellant